NO. 102942-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent

v.

JASPER NELSON
Petitioner

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Over two years ago, Defendant Jasper James Nelson (hereinafter "Mr. Nelson") pleaded guilty to three counts of Rape of a Child in the Third Degree, one count of Communication with a Minor for Immoral Purposes, and one count of Child Molestation in the Second Degree. Clerk's Papers at page 99; Verbatim Report of Proceedings at pages 4-5.

At sentencing, the Stevens County Superior Court (hereinafter the "Superior Court") imposed 60 months on the first four counts and 87 months on the final and most severe count of Child Molestation in the Second Degree. CP 62. The Superior Court granted Mr. Nelson a Special Sex Offender Sentencing Alternative (hereinafter "SSOSA") under RCW 9.94A.670. CP 63. As a condition of the SSOSA, Mr. Nelson was required to engage in treatment with Dr. Clark Ashworth, Ph.D., for a period of five years. CP 63. As part of the Judgment and Sentence, the Superior Court adopted the Department of Corrections' (hereinafter "DOC") Appendix "H" Community

Placement/Custody Conditions (hereinafter collectively "Conditions"). CP 57-59, 72-74. Mr. Nelson did not object to any of the Conditions at sentencing on May 4, 2021. CP 70.

By early December of 2021, Mr. Nelson was brought back to court for his first two noteworthy violations. CP 77-79; RP 52:12-17. Nearly six months later, Mr. Nelson was accused of another three violations. CP 135-142. Fewer than two weeks after that, Mr. Nelson was accused of another three violations, bringing his total pending violations on July 12, 2022, to six. CP 144.

All six of the alleged violations were presented in writing. CP 145-47, 149-52. The State moved for revocation of Mr. Nelson's SSOSA, in writing. CP 134, 142, 147, 152. On July 12, 2022, Mr. Nelson stipulated to each of the six new violations. RP 75:1-4, 75:5-7, 75:8-12, 75:19-24, 75-76, 76:5-9. Mr. Nelson did not contest the allegations.

The Superior Court concluded that Mr. Nelson could no longer be treated in the community without being a threat to the

community. RP 89:9-11. The Superior Court entered an Order Revoking Suspended Sentence, citing the six pending violations as the bases for revocation of SSOSA. CP 85-87.

Mr. Nelson appealed revocation of SSOSA. CP 88. On appeal, Mr. Nelson challenged Conditions 12, 13, 19, and 27, among others. Opening Brief of Appellant at pages 41, 50, & 60, respectively.

Condition 12: "Do not possess or consume alcohol or possess alcohol containers." CP 73.

Condition 13: "Submit to breathalyzer testing or any other testing to ensure no alcohol consumption." CP 73. Breath testing is hereinafter referred to as "BA".

Condition 19: "Do not use or possess marijuana or other products containing THC without a valid Washington authorization for use of medical marijuana obtained through a process approved in advance by your CCO and SOTP." CP 73.

Condition 27: "Submit to urinalysis testing or other testing to ensure drug-free status." CP 74. Urinalysis testing is hereinafter referred to as "UA".

On appeal, Mr. Nelson did not challenge the prohibition on possession or consumption of alcohol in Condition 12 or the prohibition on the consumption of controlled substances in Conditions 3 and 19. CP 73; Opening Brief of Appellant at pages 41-42; Opinion at pages 18-19, 22-23. Mr. Nelson did not challenge the Superior Court's prohibition on consumption of alcohol, only on the possession of alcohol containers. Opening Brief of Appellant at page 41; State v. Nelson at *11.

Mr. Nelson presented Division III with constitutional challenges to Conditions 13 and 27. Opening Brief of Appellant at pages 60-61. The State countered that Mr. Nelson's challenges to Conditions 13 and 27 were not ripe. Brief of Respondent at page 16. The State further argued that Mr. Nelson relied on an unpublished Opinion of the Court of Appeals. See Opening Brief of Appellant at page 63 (citing State v. Greer, No 78291-6-I,

2019 WL 6134568); Brief of Respondent at pages 16-17. Division III wholly rejected the State's argument and addressed Conditions 13 and 27 on constitutional grounds.

On February 13, 2024, Division III of the Court of Appeals handed down its Unpublished Opinion (hereinafter "Opinion"). 29 Wash.App.2d 1048, 2024 WL 564570. Division III upheld Conditions 13 and 27 under constitutional scrutiny.

Mr. Nelson filed a timely petition for discretionary review to this Court, alleging that the Opinion's affirmation of Conditions 13 and 27 was in conflict with opinions of the other two Divisions of the Court of Appeals. Petition for Review at page 23. This Court granted review only of the Conditions.

II. ISSUE

> In a community custody setting, is the extent of constitutionally permissible government intrusion determined by the facts of the underlying crime or by the Conditions that were lawfully imposed?

III. STANDARDS OF REVIEW

1. When community custody Conditions are challenged on statutory grounds, the Conditions are reviewed for abuse of discretion and will be reversed only if they are manifestly unreasonable. State v. Peters, 10 Wash.App.2d 574, 583, 455 P.3d 141 (Div. III, 2019); State v. Padilla, 190 Wash.2d 672, 677, 416 P.3d 712 (2018).

2. When community custody Conditions are challenged on constitutional grounds, the Conditions are scrutinized for narrow tailoring to achieve a compelling state interest. State v. Olsen, 189 Wash.2d 118, 129, 399 P.3d 1141 (2017).

IV. ARGUMENT

A. **In a community custody setting, the extent of constitutionally permissible government intrusion, particularly regarding drug and alcohol testing, should be determined by the Conditions that were lawfully imposed.**

Division III correctly read and applied State v. Olsen, the cornerstone opinion of this Court, when it upheld Conditions 13 and 27. Community custody conditions must be narrowly tailored to achieve a compelling state interest. State v. Olsen, 189 Wash.2d 118, 129, 399 P.3d 1141 (2017).

In Olsen, this Court analogized community custody and parole to a cell inspection in a prison. Id. at 134. The convict's underlying crime likely had nothing to do with tobacco, but tobacco is prohibited in prison and the prisoner is therefore subject to those prohibitions. This Court emphasized the differential treatment between convicts and regular citizens in their expectations of privacy: we also reiterate that DUI probationers have been sentenced to confinement but are 'serving their time outside the prison walls." Id. at133–34 (internal quotation marks omitted). "Keeping that in mind, UAs have the same privacy implications whether an individual is serving her time in prison or on probation. A search of a probationer's home, by comparison, has much wider-ranging privacy implications than a search of a prisoner's cell. For example, a search of a residence implicates not just the probationer's privacy, but potentially the privacy of third parties." Id. at 134.

Mr. Nelson will likely counter that he was not convicted of a DUI offense, but whether convicted of a DUI offense or a violent offense, the convict experiences a similar experience as a parolee. In other words, though the specific restrictions may be different between convicts and between convicts who committed different crimes, all convicts are accorded a lower expectation of privacy.

Mr. Nelson's Conditions 13 and 27 are sufficiently narrowly tailored for two reasons. First, UA and BA do not implicate the privacy rights of others. "In Winterstein, we noted that third party privacy interests must be considered when probation officers seek to search a probationer's residence, and held that probation officers are required to have probable cause to believe that their probationers live at the residence they seek to search. But such considerations are inapplicable in this context." State v. Olsen, 189 Wash.2d at 134 (internal citation omitted).

Second, Conditions 13 and 27 are imposed on Mr. Nelson only to monitor compliance with two validly imposed prohibitions. As discussed *infra*, a plain reading of Olsen mandates that UA and BA must be imposed for the limited purpose of ensuring compliance with validly imposed conditions. "We find that the testing here is a **narrowly tailored** monitoring tool imposed **pursuant to a valid prohibition** on drug and alcohol use. Random UAs are also directly related to a probationer's rehabilitation and supervision." State v. Olsen, 189 Wash.2d at 134 (emphasis added).

Mr. Nelson points to several unreported Division I and II Court of Appeals cases that appear to conflict with Division III's Opinion. At first blush, Division III's Opinion would seem to fly in the face of the unpublished opinions of Divisions I and II, but the nuances of each case are important.

In State v. Rosales, Division II, held that even though the superior court validly prohibited the defendant from using controlled substances, the imposition of UA and BA testing

requirements violated the defendants right to privacy. State v. Rosales, 30 Wash.App.2d 1016 20, 2024 WL 1070806 at *2. On appeal the defendant did not challenge the imposition of the drug prohibition, but the State conceded that the UA and BA condition should specify that the purpose was only to monitor compliance with the prohibition against controlled substances. Id.

Division II easily dealt with the BA condition by noting that there was no indication that a BA could assist in monitoring compliance with the prohibition against consumption of controlled substances. Id. "Therefore, we conclude that imposition of the breath screening condition constituted an abuse of discretion." Id.

But Division II then noted that "[t]he more significant question here involves the urine screening condition, and the issue is not whether the condition is an abuse of discretion." Id. at *3. "The issue is whether the urine screening condition is unconstitutional. As noted above, imposing an unconstitutional condition is an abuse of discretion." Id.

Division II noted a probationer's lessened expectation of privacy, but cited Olsen in announcing that even with a lessened expectation of privacy, a probationer still had some privacy rights in his or her bodily fluids. Id.

Division II's decision to strike Rosales' UA requirements was based on its conclusion that "[in Olsen], the offender was convicted of DUI, and the State had a compelling interest in monitoring DUI offenders to assess their progress toward rehabilitation." Id. (citing State v. Olsen, 189 Wash.2d at 128-29). "In addition, the court stated, 'Olsen was convicted of DUI, a crime involving abuse of drugs and alcohol. A probationer convicted of DUI can expect to be monitored for consumption of drugs and alcohol.'" Id. (quoting State v. Olsen, 189 Wash.2d at 133).

Division II determined that Rosales was not charged with a drug-related offense nor was there any evidence in the record to suggest that controlled substances related to his offense. Id.

Division II held that the UA condition was not narrowly tailored to achieve a compelling state interest. Id.

Seven days before Rosales, Division II addressed nearly the same issue in State v. Houser. Unlike Rosales, Houser is a reported case and also unlike Rosales, Houser upheld drug and alcohol prohibitions and testing requirements, even though there was no evidence that drugs or alcohol played a role in the defendant's crimes. In Houser's condition 11, the superior court prohibited him from using or consuming alcohol or marijuana. State v. Houser, 30 Wash.App.2d 235, 278, 544 P.3d 564 (Div. II, 2024). Houser's condition 12 required that he submit to UA and BA, at the request of his chemical dependency treatment provider. Id.

Houser argued that conditions 11 and 12 were scrivener's errors because the superior court said at sentencing that it did not believe that drugs and alcohol were involved in the crimes and the superior court crossed-out other conditions which were related to the purchase of alcohol. Id.

Division II rejected Houser's argument and couched conditions 11 and 12 as part of "…DOC's separate authority to impose conditions related to community safety. Simply put, conditions 11 and 12 are DOC's requested conditions for community safety." Id. Division II upheld conditions 11 and 12 on community safety grounds by pointing to DOC's risk assessment of Houser and the superior court's adoption of DOC's proposed Appendix H. Id. at 278-79. Division II held that Houser failed to demonstrate scrivenor's error or that the superior court abused its discretion. Id. at 280.

Division II sidestepped Houser's constitutional challenge by merely stating that, "Houser cites no authority establishing that either urinalysis or breath testing, when properly imposed as community custody conditions under DOC's authority, violate article I, section 7. We therefore decline to further consider his claim." Id.

In Stark, Division I, took a similar stance to Division II's holding in Rosales, but from a different angle. In Stark, the

defendant argued that UA and BA requirements were unconstitutional because those requirements did not promote his rehabilitation. State v. Stark, 5 Wash.App.2d 1036, 2018 WL 4959958 at *5. "Condition 12 requires Stark to be available for and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider." Id. (internal quotation marks and alterations omitted).

Stark argued "…that random drug testing is only constitutional where it promotes rehabilitation, as where the defendant has been convicted of a drug offense." Id.

In response, the State conceded that the BA requirement was invalid because the superior court did not prohibit Stark from consuming alcohol. Id. But the State argued that, because the court properly prohibited Stark from using controlled substances, it could require him to submit to urinalysis to monitor compliance with that prohibition. Id.

On the other hand, Stark argued that, under Olsen, random urinalysis is permissible in a DUI probation case but not in a case

such as his, where the crime is unrelated to drugs or alcohol. Id. Division I rejected the State's argument.

"Olsen does not support the general proposition that random urinalysis is constitutional to monitor a standard condition prohibiting the use of controlled substances." Id. "Stark was not convicted of a drug offense, and the State points to no evidence of a connection between Stark's offenses and drugs." Id. "We conclude that the urinalysis requirement is not narrowly tailored or reasonably necessary. Condition 12 must therefore be stricken." Id.

But notice that Division I did not engage in any analysis as to whether or not Condition 12 could still be valid so long as Condition 12 were amended to ensure the narrow tailoring discussed in Olsen. In Olsen, the narrow tailoring of the testing requirement was the safeguard.

Division I followed up Stark with State v. Greer in 2019. State v. Greer, 11 Wash.App.2d 1023, 2019 WL 6134568. Consistent with the outcome of Stark, Division I held in Greer

that where testing requirements were imposed, those intrusions could only be upheld if those testing requirements related to the underlying crime.

In Greer, the superior court "…imposed a standard condition requiring Greer to refrain from possessing or consuming controlled substances except where lawfully prescribed" and prohibited Greer from consuming alcohol. Id. at *8. Greer was not convicted of a drug or DUI offense, but did not challenge the imposition of drug and alcohol prohibitions. Id.

Greer argued that "…drug and alcohol testing is constitutional only where it promotes rehabilitation, as where the defendant has been convicted of a drug offense or an offense of driving under the influence (DUI)." Id. "The State argues that because the court lawfully prohibited Greer's use of drugs and alcohol, it may require him to submit to urinalysis and breath analysis to monitor compliance with these conditions of sentence." Id. Greer's Condition 12 required Greer to, "[b]e available for and submit to urinalysis and/or breath analysis upon

request of the CCO and/or the chemical dependency treatment provider." Id. The condition did not place any further parameters on the testing.

Division I acknowledged that "[w]hile the State may closely supervise to advance the probation system's goals of promoting rehabilitation and protecting public safety, its authority is subject to limits." Id. "The State may infringe upon individuals' privacy interest 'only to the extent 'necessitated by the legitimate demands of the operation of the [community supervision] process.'" Id. (quoting State v. Olsen, 189 Wash.2d at 125).

"Olsen does not support the general proposition that suspicionless breath analysis and urinalysis is constitutional to monitor conditions imposed under RCW 9.94A.703(2) and (3) that need not be crime-related." Id. at *9. "We conclude that condition number 12 is neither narrowly tailored nor reasonably necessary to achieve a compelling state interest and must be stricken." Id.

Divisions I and II therefore seem to read Olsen as imposing a 3-part test. Those three parts: 1. The State has the authority of law to conduct a search of a convicted person because of that person's lessened expectation of privacy, 2. The condition must be narrowly tailored to enforce a valid condition, and 3. The testing imposed must relate to the underlying crime even if the validly imposed condition did not bear such a relation. Division I and II's reading is therefore incongruous with Olsen's plain reading because it adds factor number three.

In contrast, Division III's upholding of Mr. Nelson's Conditions 13 and 27 is more textually faithful to Olsen. Division III noted that the Superior Court, "…was also permitted to impose conditions to monitor compliance with the prohibitions." State v. Nelson at *11 (emphasis added).

Just as in Olsen, the State has a compelling interest in Mr. Nelson's community custody. "The goals of the probation process can no doubt be accomplished with rules and procedures that provide both the necessary societal protections as well as the

necessary constitutional protections." State v. Lampman, 45 Wash.App. 228, 233, 724 P.2d 1092, 1095 (Div. II, 1986). "…[S]o we conclude here that although community custody is *primarily* punitive, it also has some rehabilitative aspects. An individual in community custody, like the parolee, is normally required to participate in education, employment, or community service." In re McNeal, 99 Wash.App. 617, 632–33, 994 P.2d 890, 897 (Div. II, 2000).

This Court addressed concerns that Olsen could be taken too far: "…we clarify that our decision today does not mean that probationers have no protection. Random UAs could potentially lack 'authority of law' absent a sufficient connection to a validly imposed probation condition or if the testing is conducted in an unreasonable manner." State v. Olsen, 189 Wash.2d at 134. "As such, while we find that random UAs may be permissible in order to monitor compliance with valid probation conditions, they may not be used impermissibly as part of 'a fishing expedition to discover evidence of other crimes, past or present.'" Id. (quoting

State v. Combs, 102 Wash.App. 949, 953, 10 P.3d 1101 (Div. 3, 2000)).

If this Court strikes Conditions 13 and 27, it imposes a prohibition on a convicted person but takes away the government's tools for monitoring and enforcement. Doing so would hold that a prohibition—even though not crime related—is constitutional but the means by which the government may enforce that prohibition, even if narrowly tailored, are unconstitutional. That's like de-clawing a cat and expecting it to climb a tree. Division III's reading of Olsen is correct and its holding in Mr. Nelson's case does not authorize fishing expeditions.

V. CONCLUSION

Division III's decisions on Mr. Nelson's Conditions 13 and 27 should be affirmed.

I certify that the number of words in this document are within the limits permitted by WA RAP 18.17. According to Microsoft Word, this document contains 3164 words, excluding those portions exempted by RAP 18.17.

RESPECTFULLY SUBMITTED 30th day of August, 2024.

_____

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